

Whether the Change in the Status of the Nagorno-Karabakh Armed Conflict from Non-international to International Meant for the Status of Protected Persons Affected by That Change?



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Dedication

I dedicate this work to my parents, who encouraged and believed in me.

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Abbreviations and Acronyms.

AP I	Protocol Additional to the Geneva Conventions 12 August 1949, and concerning the Protection of Victims of International Armed Conflicts, adopted on 8 June 1977
AP II	Protocol Additional to the Geneva Conventions 12 August 1949, and concerning the Protection of Victims of Non-International Armed Conflicts, adopted on 8 June 1977
CA 2	Common Article 2 of the Geneva Conventions
CA 3	Common Article 3 of the Geneva Conventions
GC I	Geneva Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field 12 August 1949 (“GC I”)
GC II	Geneva Convention (II) for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 12 August 1949
GC III	Geneva Convention (III) relative to the Treatment of Prisoners of War 12 August 1949
GC IV	Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War 12 August 1949
HC IV	Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907.
IHL	International Humanitarian Law
HRL	Human Rights Law
ICL	International Criminal Law
PIL	Public International Law
IAC	International Armed Conflict
NIAC	Non-International Armed Conflict
AC	Armed Conflict
POW	Prisoners of War
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda

TC	Trial Chamber
AC(h)	Appeal Chamber
AO	Advisory Opinion
ICPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
HRC	Human Rights Committee
UN	United Nations
GA	General Assembly
SC	Security Council
ICRC	International Committee of the Red Cross
ICRC Guidance	Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, ICRC, May 2009 (see Bibliography or full citation)
SFRY	<i>Socialist Federal Republic of Yugoslavia</i>
USSR	Union of Soviet Socialist Republics
NK	Nagorno-Karabakh
KGB	Committee of State Security (abbreviation from Russian)
MVD	Ministry of Internal Affairs (abbreviation from Russian)
HRW	Human Rights Watch
HR	Human Rights
CIHL	Customary International Humanitarian Law
CIL	Customary International Law
DPH	Direct Participation in Hostilities
PCIJ	Permanent Court of International Justice

Introduction.

A. Background and objectives.

Undertaking research pertaining to the conduct of warfare in the Caucasus is a very challenging task as it requires reference to historical events that took place decades and even centuries ago, and involves very complex ethnic questions of the neighboring nations, which includes territorial claims that, - ipso facto have fuelled ethnic hatred in the region.

This thesis is dedicated to the conflict in Nagorno-Karabakh (hereafter NK) between Azerbaijan and Armenia. The territory that today comprises NK, as a bridge between Black and Caspian Seas, has been a transit and settlement zone for multiple ethnic groups for many centuries. Coexistence of those groups was accompanied by constant territorial claims and conflicts, which has been exacerbated due to ambiguity surrounding the arrival - in terms of time and scope - of separate ethnic groups in the given area, and their specific settlement zones within the region (today the Caucasus still represents a home for 50 different ethnic groups)¹.

Even in the etymology of the name of the region, crossbreeding of cultures can be discerned; where “Karabakh” is a Turkish-Persian fusion, translated as “Black Garden”, “Nagorno” is the Russian word for “mountainous”². While confrontations between the two nations - Azerbaijan and Armenia - existed throughout history, existence within the USSR as part of the one State temporarily calmed down tensions. Nonetheless tensions later erupted violently in the struggle for this contested region of NK, belonging to Azerbaijan, but populated at that time by an Armenian ethnic majority.

This thesis researches the legal regulation of the conflict in NK, from the time of the area’s incorporation within Soviet Union, through to its transformation into two independent states (upon dissolution of the USSR). The objective of the paper is to illustrate how global historical transitions affected the application of the legal regime in terms of the conflict, and its respective rules pertaining to the protection of civilians. In doing so, I will elaborate on applicability of international humanitarian law (IHL) in the conflict, identifying, firstly, whether the confrontations which have taken place amounted to the armed conflict (AC) proper, since only existence of AC generates necessity for the IHL’s legal regulation. This analysis will be

¹ H.Kruger, *The Nagorno-Karabakh Conflict. A Legal Analysis*, p.1-2.

² De Waal, “Black Garden”, p.8.

undertaken through elaborating on the concept of AC, and examining how the concept of AC applies to the facts on the ground. Secondly, my analysis will demonstrate how the changing nature of the conflict affected the legal protection enjoyed by civilians.

Overall this thesis is inspired by the fact that the war in NK was little known in the international arena, while the AC's in Yugoslavia, occurring at the same time, received much attention. The war in NK resulted in heinous violations of fundamental rights and was considered one of the bloodiest conflicts in the post-Soviet area, - resulting in thousands of deaths and millions of refugees. Nevertheless the conflict is still unresolved, as is the status of the occupied territories (NK region and neighboring areas). While conflicts in former Yugoslavia were addressed by ICTY – which was established to investigate violations of IHL and international criminal law (ICL), prosecute and bring to justice perpetrators of various crimes, thus, contributing to restoration of the peaceful coexistence of nations after those disastrous events; none of this was done in relation to the NK conflict. Being personally from Azerbaijan, this situation of no legal justice is very frustrating. Therefore, this thesis attempts to assess the legal regime through the development of the conflict and analyze its affects in relation to protected persons. The author understands and acknowledges that violations of IHL and fundamental rights were committed by both parties to the conflict; nevertheless the scope of this thesis is to examine the failures and violations committed by Armenian side and protections enjoyed by Azeri civilian population in the conflict.

B. Structure.

This thesis is divided into five chapters. Chapter one gives an introductory overview of IHL, pointing out the main tenets of the development of the discipline, its principles and sources. Chapter two seeks to give understanding of the concept of AC's (with its constitutive elements) in its different typologies, with reference to the corresponding legal regimes, pertaining to the different types of AC's, as codified today in IHL instruments – in the Geneva Conventions (GC) and Additional Protocols (AP), and developed further by jurisprudence and scholarly opinions. Chapter three gives an overview of the history of the region and development of the conflict from its USSR era through to its post-dissolution period. Chapter four analyses the tenets of AC and its constituent elements in relation to the confrontations in NK, with conclusions on the nature of the hostilities in each particular periods, from its USSR development and post-USSR escalation. Chapter five provides analysis of how the changed nature of the AC affected the legal

protection enjoyed by civilians; reference is made to the IHL customary and conventional rules on protection of civilians and other various concepts of international law, with concluding remarks on the nature of ultimate character of the protection.

C. Methodology.

In answering the research question a mix of methodologies will be used in this thesis. One of the methodologies will be theoretical implying reference to scholarly opinions and the main developments regarding the issues discussed. Qualitative method will be applied, using techniques such as case studies, interviews, and observations. In this regard reference will be given to international jurisprudence, mainly of ICTY. Doctrinal research or “black-letter law” approach will be applied in relation to the provisions and norms of international instruments, Geneva Convention’s and Additional Protocol’s, where legal interpretation and explanation of the provisions therein constitutes a special part in conducting this research. Reference to other disciplines, such as history, political science, sociology, also will be made, thereby making this research interdisciplinary. Finally, throughout the whole paper, international and comparative legal analysis will be applied by using findings, mainly, of the ICTY in relation to the NK conflict. These research methodologies will help in answering the research question posed in this thesis.

Chapter 1: What is IHL and Why We Need It?

In the situation of AC application of the rules and norms of IHL is of a genuine importance. This application, supposedly, makes the conflict regulation easier and conduct of the armed activities per se became pure from illegal violence and following the letter of law within the considered discipline.

1.1 *What is IHL? Tenets and principles.*

Law of hostilities- or IHL comprises the whole of established law serving protection of a man in AC (the concept of AC will be considered in the following chapter). It applies with equal force to all parties in an AC, irrespective of which party initiated that conflict³. Dinstein stipulated: “Almost by definition, {IHL} entails human losses, suffering and pain....The law of {IAC} can and does forbid some modes of behavior, with a view to minimizing the losses, the suffering and the pain...”⁴.

Kolb stipulates that IHL can be defined as a branch of Public International Law (PIL), which limits the use of violence in AC's by:

- 1) sparing those who do not or no longer directly participate in hostilities;
- 2) limiting the violence to the amount necessary to achieve the aim of the conflict - only to weaken the military potential of the enemy⁵.

Today's IHL protects persons not directly participating in active hostilities and provides protection to the bigger audience of the enemy nation than it did before, when it only covered professional armies of the belligerents⁶. In the evolution of IHL main principles were established (principle of necessity (or principle of limitation) and principle of humanity) reflecting the core of the discipline and today they are expressed in the following principles:

- The principle of distinction- requires distinction at all times between belligerents and civilians, and between military objectives and civilian objects;

³ D.Fleck, *The Handbook of International Humanitarian Law*, p.1.

⁴ Y.Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, p.1.

⁵ R.Kolb, *An Introduction to the International Law of Armed Conflicts*, p.15.

⁶ *Ibid*, p.29-33.

- The principle of necessity- requires adoption of the measures which are only necessary to overpower the enemy and bring him to surrender, what is the main purpose of AC;
- The principle of proportionality- requires that all measures taken by belligerents should be commensurable with the aims parties seek to achieve in the conflict. In this context proportionality means that military advantage gained in any operation should outweigh the damage caused to civilians and civilian objects during that operation⁷.

Those principles, besides being codified in the treaty law, were also authoritatively restated by International Court of Justice (ICJ) in its Advisory Opinion (AO) on Nuclear Weapons case, highlighting its established nature as customary norms⁸.

1.2 Sources of IHL.

According to the Statute of ICJ there are following sources of international law: international conventions, international custom, as evidence of a general practice accepted as law, general principles of law recognized by civilized nations, judicial decisions and the teachings of the highly qualified publicists⁹.

1.2.1 International custom.

Customary international law (CIL) represents unwritten rules, developed through general state practice and “accepted as law”. There are distinguished objective and subjective elements of the custom, where objective relates to the general practice of States, while subjective (opinio juris- or legal opinion) could be inferred from the wording “accepted as law”, representing motivation of those who are supposed to follow a custom, considering it obligatory way of behavior. Latin expression – opinio juris sive necessitatis, meaning “...a belief that this practice is rendered obligatory by the existence of a rule of law requiring it”¹⁰ –serve as clarification of the concept.

State practice consists of actual conduct (acts of commission or omission) and declarations and statements of States. Furthermore term “general practice” should not be confused with universal, meaning that not every State needs to participate in emergence of a particular norm, nonetheless once that norm was solidified as part of customary law- it is binding

⁷ Ibid., p.43-49.

⁸ Legality of the Threat or Use of Nuclear Weapons, AO, ICJ Reports 1996, para.77-78.

⁹ ICJ Statute, Art. 38 (1).

¹⁰ North Sea Continental Shelf, Judgment, ICJ Reports 1969, Para.77.

on all States¹¹. The importance of customary rules and norms was also emphasized through the expression in treaty law: *“In cases not covered by ... international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience”*¹².

1.2.2 International treaties.

A treaty-is an agreement, concluded between States in written form and governed by international law¹³, where States express their consent to be parties and to be bound by provisions thereof.

Treaties could be expressive of already existing customary rules, codifying them, where those States, which did not become party to such treaties, still obliged to fulfill provisions thereof due to their customary nature; in this way customary law fills in the gaps in legal regulation¹⁴.

1.2.3 International treaties related to AC's.

Rules, pertaining to the conduct of war, could be found already in ancient laws: the “Code of Hammurabi”; in the special orders of Cyrus I, King of the Persians from 7th century BC; the Laws of Manu and etc.¹⁵ Nevertheless proper developments and codifications appeared much later and can be discerned from St Petersburg Declaration from 19th century and further on in the development of the Hague and Geneva Law.

The Hague Conventions from 1899 and 1907 presented multiply facets of conduct of hostilities on land, sea and air, among which HC IV of 1907 had become the mirror of customary law, as reiterated by Nuremberg Tribunal and Tribunal for the Far East¹⁶. The Hague law regulated questions of the means and methods of warfare, and of the rights and duties of belligerents in occupied territories.

Geneva Conventions (GC's), also known as “Red Cross Conventions” were adopted and revised in 1864, 1906, 1929, and finally in 1949 the Four Conventions, existing today, were adopted, dealing with the wounded and sick in armed forces in the field (Convention I), wounded, sick and shipwrecked members of armed forces at sea (Convention II), prisoners of

¹¹ Dinstein, p.5-6.

¹² AP I, art.1(2).

¹³ Vienna Convention on the Law of Treaties, 1969, Art.2(1)(a).

¹⁴ Dinstein, p.9.

¹⁵ Fleck, p.16.

¹⁶ Dinstein, p.9-11.

war (Convention III), and protection of civilians (Convention IV). Moreover those Conventions were complemented by Additional Protocols (AP's), where Protocol I relates to IAC's and Protocol II to NIAC's¹⁷.

Now two sets of law (The Hague and Geneva Law) are regarded as the one united field of international law- IHL, what was confirmed by ICJ: *“These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as {IHL}”*¹⁸.

¹⁷ Ibid.

¹⁸ See supra note 8, para.75.

Chapter 2: Typology of Armed Conflicts.

Existence of an AC deems application of the rules and principles of IHL necessary, regardless of the nature of a conflict. The crucial moment is distinction of an AC from the internal tensions and disturbances, to which IHL is not relevant, since mentioned events are regulated by the norms of domestic law and separate regime of International Human Rights Law.

This tendency was developed in previous centuries when recognition of belligerency triggered application of the laws of war¹⁹. The act of recognition signified that violence gained such a sustained level that both sides were entitled to be treated in the same way as belligerents in an IAC.

2.1 A brief typology of AC's.

Although IHL's aim is the limitation of the effects of AC's, it does not fully define what constitutes AC's in its existent treaty law. While relevant conventions refer to various types of AC's and therefore render some understanding of the legal regimes in different situations of hostilities, these instruments don't offer precise criteria of the content of the categories of the conflicts they refer to. Moreover there is not any structure or body in international arena, which pronounces on the nature of violence or AC, although ICJ pointed out that "mere frontier incident" did not represent "armed attack"²⁰.

Meanwhile proper understanding of those concepts is essential in order to determine what kind of situation we are facing and establish legal regime for that situation. In IHL there are distinguished two types of legal regimes, applicable to the situations of AC's: regime pertaining to IAC's and regime pertaining to NIAC's. They have different in nature rules (rules governing conduct of IAC's are more developed than treaty rules pertaining to NIAC's, for example the law related to occupied territories is only developed in IAC's; status of the parties is also different, where entitlement to combatant or prisoner of war (POW) status is not valid for the non-State party in NIAC's²¹). Nevertheless an important common feature is that great majority of customary rules apply to both types of AC's²². In this respect interpretation of different categories of AC's through international legal practice and recent developments in IHL seems necessary.

¹⁹ For more detailed discussion see chapter 1 of L.Moir, *The Law of Internal Armed Conflict*.

²⁰ *Nicaragua v. USA*, Merits, Judgment, ICJ Reports 1986, para.195.

²¹ Kolb, p.69-70.

²² *Ibid*, p.80.

2.2 International Armed Conflicts (IAC's).

Legal regime, pertaining to IAC's, has been progressively extended through development of treaty law. With adoption of the GC's a broader approach, based on objective concept of AC, was introduced. Further extension was done with adoption of AP I in 1977, which added another type of conflict to the regime of IAC's, namely wars of national liberation²³.

2.2.1 GC/API armed conflicts, including belligerent occupation.

Common Article (CA) 2(1) of GC's applies to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them"²⁴. In this way, IAC's are conflicts, where two or more sovereign States are engaged, and formal declaration of existence of war is not required; thus, war can exist in technical sense (commencing with formal declaration of war by one State against another) or in material sense (when the comprehensive use of armed force in the relations between two States exist)²⁵.

The concept of IAC's is also developed in legal doctrine. D. Schindler stated, "...existence of an armed conflict within the meaning of {CA 2} can always be assumed when parts of the armed forces of two States clash with each other. [...] Any kind of use of arms between two States brings the Conventions into effect". H.-P. Gasser explains that "any use of armed force by one State against the territory of another, triggers the applicability of the {GC's} between the two States. [...] It is also of no concern whether or not the party attacked resists. [...] As soon as the armed forces of one State find themselves with wounded or surrendering members of the armed forces or civilians of another State on their hands, as soon as they detain prisoners or have actual control over a part of the territory of the enemy State, then they must comply with the relevant convention"²⁶.

According to ICRC "differences arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of article two, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place"²⁷. In light of these developments, concept of IAC and corresponding application of IHL was established in accordance with objective criteria of

²³ S.Vite, Typology of armed conflicts in international humanitarian law: legal concepts and actual situations, p.70.

²⁴ CA 2 of GC's, regulation of this category of AC's is also retained in AP I, art.1(3).

²⁵ Dinstein, p.15.

²⁶ ICRC Opinion Paper, How is the Term "Armed Conflict" Defined in International Humanitarian Law?, p.2.

²⁷ ICRC, Commentary to the GC I, p.32.

existence of AC on the ground, regardless of the will and determinations made by States, engaged in the hostilities²⁸.

In the following developments ICTY adopted general notion of IAC “an armed conflict exists whenever there is a resort to armed force between States”²⁹, which was further supported by international jurisprudence.

i) Belligerent Occupation.

Another category of IAC’s – occupation is regulated by CA 2 (2). The notion of occupation was defined in the Hague Convention IV (HC IV) from 1907, where article 42 stipulated that “territory is considered occupied when it is actually placed under the authority of the hostile army”. From this provision two conditions are inherited: 1) ability of the occupier to exercise effective control over a territory that does not belong to it; 2) lack of consent of the territorial State for this intervention. Under effective territorial control is implied a substitution of powers, when overthrown government lacks ability to exercise its authority, while occupying Power is in a position to fill that gap by exerting its own power. This is usually realized through the deployment of the enemy troops on the territory concerned, who impose the minimum level of stability. However in some cases, territorial control is not exercised directly by the occupation forces, but via a puppet government or another form of subordinate local power³⁰. For such instances jurisprudence of ICTY presented a formula of foreign State’s ‘overall control’ of the local agents’ who actually exercising ‘effective control’ over the territory in question³¹. As for the criterion of consent, CA 2(2) highlighted that relevant rules apply even if the occupation “meets with no armed resistance”, what does not relate to the instances when power is seized as result of hostilities³².

2.2.2 API conflicts, i.e., wars of national liberation.

With adoption of AP I in 1977, IAC’s besides being presented by inter-State conflicts only, also included conflicts between government forces and some non-governmental groups. The Protocol extended its application to the situations of “armed conflicts in which peoples are

²⁸ Ibid., and ICRC, Opinion Paper, p.1.

²⁹ ICTY, Prosecutor v. Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, para.70.

³⁰ S.Vite, Typology...,p.74.

³¹ ICTY, Blaskic TC Judgment, para.149.

³² Supra note 30.

fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination...”³³.

The people’s right to self-determination was encompassed in the UN Charter, Declaration on the Principles concerning Friendly Relations, International Covenants on Human Rights by virtue of which “they freely determine their political status and freely pursue economic, social and cultural development”³⁴. The question is what we understand under the term “people”? Although there is no definition in international law of what constitutes a people, it is important to point out to some criteria, which assist in recognizing a group as a people: defined territory, common language, culture or ethnic ties with a common sentiment of forming a people and a political will to live together as such. In other words, possession of common and distinctive elements, which serve as the bond between people, who belongs to this group, and something what separates them from the others³⁵.

As ICRC emphasized there must be an AC in which a people is struggling against colonial domination, alien occupation or a racist regime, where this struggle is taking place in order to exercise its right to self-determination³⁶.

2.2.3 “Internationalized” non-international armed conflicts.

Intervention of the State in a previously existing internal conflict, for example when a foreign Power sends troops into a territory of another State to support a movement opposing the local government, by that internationalizing it, comprises situations of another type of IAC’s. Internalization of the conflict can also occur through intervention from a distance³⁷, if the required level of control is achieved. ICTY established “overall control” test, which is expressed as “control by a State over subordinate armed forces or militias or paramilitary units of an overall character (comprising more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation...” The Chamber stated that “overall control” is achieved when a foreign State “has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and

³³ AP I, Art. 1(4).

³⁴ Art. 1(1) of ICPR and ICESCR.

³⁵ ICRC, Commentaries on the AP’s, para.102-106.

³⁶ Ibid., para.112.

³⁷ ICTY, Tadic AC(h) Judgment, para.84.

equipping or providing operational support to that group”³⁸. By this involvement goes beyond mere logistical support, but does not imply that everything done by the group is directed by the State from a distance (for example State do not need to plan all the operations, choose targets, give specific instructions concerning the conduct of military operations and etc. to the units).

In the following developments of jurisprudence and doctrine “overall control” test was used as a mean of determining whether or not the conflict is international in nature³⁹.

It is clear that IAC’s are generally governed by Four GC’s and by AP I, which complements and develops provisions of GC’s, where those treaties have almost universal application (194 State parties to GC’s and 171 to the AP I⁴⁰). As was stipulated by S. Vite, the nature of conditions required for the existence of IAC’s (intensity of the hostilities and organization of the parties) should be evaluated freely. Level of intensity is very low, presuming that situations prescribed by treaties simply need to exist, without it being extended over time or for it to create a certain number of victims⁴¹; while organization of the parties, since reference is to the government forces of States, is already presumed to meet the requirement without necessity to carry out evaluations in each case⁴².

2.3 Non-International Armed Conflicts (NIAC’s)

In the legal doctrine, according to H.P. Gasser, NIAC’s are understood as:” armed confrontations that take place within the territory of a State between the government - on the one hand and armed insurgent groups on the other hand. [...] Another case is the crumbling of all government authority in the country, as a result of which various groups fight each other in the struggle for power”⁴³.

2.3.1 AP II Conflicts.

AP II applies to NIAC’s and is the first document to define NIAC’s as “...armed conflicts ... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible

³⁸ Ibid., para.137.

³⁹ Bosnia and Herzegovina v. Serbia and Montenegro, (Genocide case), ICJ reports 2007, para.404; A. Cassese, “The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia”, p.649-668.

⁴⁰ See, <http://www.icrc.org/ihl.nsf/INTRO?OpenView>.

⁴¹ S. Vite, Typology, p.72, also ICRC, Commentaries to GC I, p.32; ICRC, Opinion Paper, p.1.

⁴² ICTY, Haradinaj, TC Judgment, para.60.

⁴³ ICRC, Opinion Paper, p.5.

command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”⁴⁴.

NIAC’s within the meaning of AP II can only exist if the situation attains a degree of violence that distinguishes it from cases of internal tensions or disturbances⁴⁵. Nonetheless APII defines a more limited field of application than that of Common Article (CA) 3, it requires non-governmental forces to have a particularly high level of organization, in the sense that they must be placed “under responsible command” and exercise territorial control, allowing them ‘to carry out sustained and concerted military operations and to implement this Protocol’⁴⁶. In this way Protocol “develops and supplements {CA 3} without modifying its existing conditions of application...”⁴⁷, thus CA 3 has lower threshold, as it does not pose conditions set in AP II, where two treaties keep their autonomy and exist independently.

AP II also restricts its field of application only to AC’s between governmental forces on one side and dissident armed forces or other organized armed groups on another⁴⁸.

Under AP II the element of protraction was modified and formed in the higher threshold of “sustained and concerted military operations”, still implying duration and intensity but on a more objective basis⁴⁹.

AP II definition clearly imposes territorial control, while case law suggests that territorial control is not a requirement for existence of AC⁵⁰. Meanwhile ICRC stipulates that this control could be “relative” and requires that armed groups are organized in such a way as to enable them to allow sustained and concerted military operations and application of the Protocol⁵¹.

On the concept of responsible command, ICRC speculated about some degree of organization of armed group, which does not mean hierarchical system of military organization, pertaining to regular armed forces. This implies that command should be capable of planning and carrying out sustained and concerted military operations and imposing discipline⁵².

⁴⁴ AP II, art.1(1).

⁴⁵ AP II, art.1(2).

⁴⁶ AP II, art.1(1).

⁴⁷ Ibid.

⁴⁸ AP II, art.1(1), also ICRC, Commentary on the APs, para.4339, and para.4460.

⁴⁹ Moir, p.107.

⁵⁰ ICTY, Prosecutor v. Slobodan Milošević, Third Chamber Decision on Motion..., para.36.

⁵¹ ICRC, Commentary on the APs, para.4465-67.

⁵² Ibid., para.4463.

Lastly under ability to carry out sustained and concerted military operations was understood to have persistent and continuing operations, which are planned and agreed upon, what means could be undertaken only by organized groups⁵³.

Generally, the last three requirements represent conditions pertaining to the notion of organization of the armed group.

2.3.2 CA 3 Conflicts.

CA 3 of the GCs which applies in the case of “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”⁵⁴ for the first time laid down the rules, which parties supposed to observe during NIAC’s. As was clarified by ICTY jurisprudence, NIAC’s (within CA 3) are those in which at least one of the parties involved is not governmental, where hostilities take place either between one (or more) armed group(s) and government forces or solely between armed groups⁵⁵. The significance of CA 3 is expressed through its application only to situations, which reached the level of AC’s and thus crossed the thresholds of less serious forms of violence, namely “situations of internal disturbances and tensions”⁵⁶. In this respect ICTY’s TC went on to say that in “an armed conflict of an internal or mixed character, these closely related criteria {intensity of the violence and organization of the parties to the conflict} are used solely for the purpose, as a minimum, of distinguishing an {AC} from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to IHL”⁵⁷. In this respect, it is of necessity to establish relevant level of intensity, which is higher in this matter, than required for establishment of IAC’s, and refer to the organization of the parties to the conflict to qualify for an AC within the framework of CA 3. The jurisprudence of ICTY reveals that every time when situation can be defined as “protracted armed violence” it satisfies the threshold of intensity.

i) Intensity of the conflict or protracted violence:

Tadic Decision firstly pronounced on the element of protraction of the violence and was further supported in the following jurisprudence⁵⁸. Evaluations whether internal armed violence is “protracted” or not, are realized by reference to the entire period - from initiation to cessation

⁵³ Ibid., para.4469.

⁵⁴ CA 3(1) of the GC’s.

⁵⁵ ICTY, Tadic Decision, para.70.

⁵⁶ ICRC, Opinion Paper, p.3.

⁵⁷ ICTY, *Tadic*, TC Judgment, para.562.

⁵⁸ Supra note 55.

of hostilities. ICTY stipulated that most instances of internal strife satisfy the requirement, whereas ICTR's jurisprudence even established that armed violence extending over only a few months satisfied the "protracted" requirement within Tadic's definition and by this within framework of CA 3⁵⁹.

Following criteria of protraction/intensity of armed hostility were mentioned in the jurisprudence: increase in armed clashes and seriousness of attacks (for ex. killing of people who were employed by the police or cooperated with them)⁶⁰; spread of clashes over the territory and period of time⁶¹; increase in the number of government forces sent against non-governmental groups and mobilization and distribution of weapons, such as rifles, guns and mortars⁶². Importance is given also to the attention of the UN SC and adoption of the resolutions on the matter⁶³; or more general indications of intensity such as number of civilians fleeing the combat zones, general extent of material destruction, usage of heavy weapons and military equipment's such as tanks, number of casualties etc.⁶⁴ Factors such as blocking or besieging of towns and their shelling; the quantity of troops and units deployed; the occupation of towns and villages; deployment of government forces to the crisis area; the closure of roads; attempts of representatives from international organizations to broker and enforce cease fire agreements⁶⁵.

It is important to emphasize that these assessments help establish whether threshold of intensity has been reached; the mentioned conditions need not to exist concurrently⁶⁶.

ii) Organization of the parties:

In the sense of CA 3 the parties to NIAC are either government forces on the one side and organized armed group/s on another or both sides could be armed groups confronting each other. While CA 3 does not define parties to the conflict it applies to "each party to the conflict", implying that its provisions are binding on a non-signatory Party. In this way the mere fact of existence of AC requires application of the CA 3⁶⁷.

⁵⁹ D. Jinks, "The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts", p.6.

⁶⁰ ICTY, Milosevic Decision, para.28; ICTY, Tadic TC Judgment, para.565.

⁶¹ ICTY, Milosevic Decision, para.29; ICTY, Tadic TC Judgment, para.566.

⁶² ICTY, Milosevic Decision, para.30-31; ICTY, Limaj TC Judgment, para.90.

⁶³ ICTY, Tadic TC Judgment, para.567; Limaj ibid.

⁶⁴ ICTY, Haradinaj TC Judgment, para.49.

⁶⁵ ICTY, Boskoski TC Judgment, para.177.

⁶⁶ S.Vite, Typology...,p.77.

⁶⁷ ICRC Commentaries, GC I p.51 and GC IV p.37.

ICRC speculated about the “*minimum degree of organization and discipline* (of an armed group opposing a government) - in order to be recognized as a party to the conflict”. Moreover ICRC emphasized that, if a State resorts to the use of force against the rebels, they could qualify as a party to the conflict⁶⁸. Minimum level of organization was reiterated in various reports of the different specialized commissions and international organizations⁶⁹.

TC in Limaj commented on the degree of organization where it “need not be the same as that required for establishing the responsibility of superiors for the acts of their subordinates within the organization...”⁷⁰. TC in Boskoski restated necessity of “some degree of organization”, where “warring parties do not necessarily need to be as organized as the armed forces of a State, nor the degree of organization for an armed group to a conflict to which {CA 3} applies need be at the level of organization required for parties to {AP II AC’s}...”⁷¹.

While Tadic Decision pointed out to the organizational requirement of the group it did not elaborate on the matter⁷². Further clarifications of the notion were developed by following jurisprudence. In the Milosevic Decision TC pointed out to the following criteria of the organization of the non-governmental party: official joint command structure; headquarters; designated zones of operation; ability to procure, transport and distribute arms⁷³. Limaj and Boskoski judgments emphasized the following features: existence of the General Staff in the first place and appointment by them of zone commanders; existent chain of command where Staff issues various directions and public statements to different units on behalf of the organization and unit commanders give combat orders to subordinate units and soldiers, who act in accordance; capacity to control part of the territory; introduction of the system of disciplinary rules and military police; recruitment, training and equipment of new volunteers; usage of artillery mortars and rocket launchers. Recognition by international representatives of non-governmental armed group as necessary party in the political negotiations, with ability to negotiate and conclude cease-fire agreements or peace accords⁷⁴.

⁶⁸ ICRC, “Armed conflicts linked to the disintegration of State structures”, Available at <http://www.icrc.org/eng/resources/documents/misc/57jplq.htm>.

⁶⁹ A. Cullen, “The Concept of Non-International Armed Conflict in International Humanitarian Law”, p.123, and Moir, p.33.

⁷⁰ ICTY, *Limaj* TC Judgment, para.89.

⁷¹ ICTY, *Boskoski* TC Judgment, para.197.

⁷² Sonja Boelaert-Suominen, *Commentary...*, at 634.

⁷³ ICTY, *Milošević* Decision, para.23-24.

⁷⁴ ICTY, *Limaj* TC Judgment, para.94-122; ICTY, *Boskoski* TC Judgment, para.199-203, as supported in *Haradinaj* TC Judgment, para.60.

Among other features in some cases were highlighted additional criteria of organization under civilian authority prepared to observe laws of war, although this was not a requirement for existence of AC⁷⁵.

It is necessary to clarify that criteria mentioned above as indicative of the concepts of intensity of violence and organization of the parties are exemplary and “requires a case-specific analysis of the facts “or should be determined on the case by case basis”⁷⁶.

2.3.3 Situations falling short of NIAC’s.

When criteria comprising AC (intensity and organization) are absent, occurring confrontations are referred to as short of AC or constituting internal disturbances or tensions. These concepts present types of social instability, which have never been defined in law, although reference to those situations exists in AP II⁷⁷. In background documents for drafting AP II, ICRC considered that internal disturbances are situations in which “there is no {NIAC} as such, but there exists a confrontation within the country, which is characterized by a certain seriousness or duration and which involves acts of violence {which} can assume various forms, all the way from the spontaneous generation of acts of revolt to the struggle between more or less organized groups and the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order...”⁷⁸. As for internal tensions, they cover less violent circumstances of political, racial or other nature, involving, for example, mass arrests, a large number of ‘political’ detainees, torture or other kinds of ill-treatment, forced disappearance and/or the suspension of fundamental judicial guarantees. As ICRC summarized, there are internal disturbances, without being an AC, when a State uses armed force to maintain order; there are internal tensions, without being internal disturbances, when force is used as a preventive measure to maintain respect for law and order. Both concepts are not falling under regulation of IHL; nevertheless they are covered by framework of Human Rights Law (HRL)⁷⁹.

⁷⁵ Milosevic Decision, para.34.

⁷⁶ Idi Gaparayi, “The Milosevic Trial at the Halfway Stage” p.753; and ICTR, “Prosecutor v. Musema” TC I, para.251 .

⁷⁷ APII, Art.1(2).

⁷⁸ ICRC, Protection of Victims of Non-International Armed Conflicts, p.79; as well supported in the ICRC, Commentaries on the AP’s, para.4475.

⁷⁹ Ibid, ICRC, Commentaries, para.4476-79.

2.4 Nature of CA 3.

CA 3 is like a “Convention in miniature”, which applies to the situations of NIAC’s and ensures the application of the rules of humanity, which are recognized as essential by civilized nations. Furthermore additional advantage of the text of the article is that it applies automatically, without any condition of reciprocity⁸⁰. CA 3 now reflects minimum standards applicable in any AC, whatever its classification⁸¹. ICJ stated that “Article 3...defines certain rules to be applied in the {NIAC’s}. There is no doubt that, in the event of {IAC}, these rules also constitute a minimum yardstick... and they are rules which, in the Court's opinion, reflect "elementary considerations of humanity"⁸². By this, CA 3 became a baseline from which no departure, under any circumstances, is allowed⁸³, what highlights article’s customary nature.

2.5 Developments in jurisprudence and treaty law.

The first definition of AC was made in 1995 in the Tadic Decision “... {AC} exists whenever there is a resort to armed force between States or *protracted armed violence* between governmental authorities and *organized armed groups* or between such groups within a State...”⁸⁴.

In the following jurisprudence Tadic definition was referred to as a ‘criterion’ applicable to “all conflicts whether international or internal”⁸⁵ and as a test of application of CA 3. Elements of AC, as propounded in Tadic, were further reiterated in the following ICTY jurisprudence: in Delalic⁸⁶; in Kordic and Cerkez⁸⁷ and numerous other cases. Moreover those requirements were echoed in ICTR jurisprudence: Akayesu case⁸⁸; Rutaganda case⁸⁹ and etc.

Furthermore Tadic definition was incorporated in the ICC Statute, which defined NIAC’s as “{AC’s} that take place in the territory of a State when there is protracted {AC} between governmental authorities and organized armed groups or between such groups”⁹⁰. This definition established a field of application that is stricter than of CA 3 (with requirement of protraction),

⁸⁰ ICRC, Commentary on GC I, p.48.

⁸¹ Sonja Boelaert-Suominen, Commentary..., p.620.

⁸² Supra note 20, Nicaragua Merits, para.218.

⁸³ S. Perrakis and etc., Armed Conflicts and International Humanitarian Law, p.11-12.

⁸⁴ ICTY, Tadic Decision, para.70.

⁸⁵ ICTY, Blaskic, TC Judgment, para.64.

⁸⁶ ICTY, Delalic et al., TC Judgment, para.184.

⁸⁷ ICTY, Kordic and Cerkez, AC Judgment, para.341

⁸⁸ ICTR, Akayesu Judgment, TC, para.620.

⁸⁹ ICTR, Rutaganda Judgment, TC, para.93.

⁹⁰ ICC Statute, Art. 8(2)(f).

however, broader than of APII, as it does not require armed group(s) to exercise territorial control, therefore standing in a half way between those categories⁹¹.

From the developments in jurisprudence and treaty law, we see that Tadic formula was widely utilized in the following ICTY, ICTR and other jurisprudence, and in the reports of independent experts, international commissions of enquiry and various manuals on the law of AC's. Moreover further codification of this threshold in the Rome Statute point out to the customary nature of those criteria⁹².

⁹¹ S. Vite, *Typology...*, p.82.

⁹² *Supra* note 69, Cullen, p.120-122.

Chapter 3: Historical Overview.

Introduction to the general history is necessary as it gives understanding of the legal claims and argumentation of the parties, as well understanding of the causes of the conflict.

3.1 Early history and roots of the conflict.

There are two different versions (Armenian and Azeri) in the ancient history, each claiming belonging of NK region to their respective territories⁹³. From the 7th century discussed territories were under various occupations: Arab, Mongolian, Turkic, Persian control were respectively established here. Caucasus area from the 16th century was experiencing confrontations between great powers of Persian, Ottoman and Russian empires, which significantly affected territorial and demographic delimitations of the region.

In the 19th century today's Azerbaijan and Armenia were partitioned into Khanates (Karabakh, Baku, Nakhjivan, Yerevan and etc.), semi-independent principalities⁹⁴, where between 16 and 19th centuries Karabakh and Yerevan were dominated by Muslims (approximately 117,000 of Azerbaijanis and Kurds in 1820th, while 8.4% of Armenians lived in Karabakh in 1823⁹⁵); and in the southern Caucasus Muslim majority constituted 80%, while Armenians represented 20% of the total population.

As a result of the first Russo-Persian war in 1812-13, the treaty of Gulistan was concluded, which officially transferred Karabakh from Persian to Russian rule; nevertheless confrontations between empires continued, leading to the second Russo-Persian war with repeated defeat for Persians, culminating in conclusion of Turkmenchay treaty in 1828. This treaty strengthened Russian control in the region and provided for a resettlement of Armenians from Persia and Ottoman Empire to the Caucasus, where in Azerbaijan they were resettled in Karabakh, Zangezur and Nakhjivan areas. Respectively large number of Muslim population of the region left for the territories under Persian or Ottoman control. According to Russian census reports, Armenians in Karabakh reached their majority of 53% in 1880; in Yerevan 53.8% in 1832⁹⁶.

The process of population exchanges accelerated after every Russo-Turkish war (1853-56 and 1876-78) since Russians saw Azeris as generally unreliable and as potential allies to the

⁹³ Kruger, p.4.

⁹⁴ S. E. Cornell, The Nagorno-Karabakh Conflict, p.4.

⁹⁵ Kruger, p.7-8.

⁹⁶ Ibid, p.8-9; Cornell, p.5-6.

Turks, given their ethno-linguistic affinities; in contrast Armenians were seen as Russia's natural allies, devoted and reliable for the Emperor⁹⁷. It was assumed that between 500,000 and 700,000 Armenians migrated to the South Caucasus, mainly to Yerevan and NK, during and after the wars with Ottomans, what increased the number of Armenians in the territories to 900,000 by the end of the 19th century⁹⁸.

Tensions in the beginning of the 20th century resulted in inter-ethnic clashes in the territories of Baku, Ganja, Nakhjivan, Karabakh and Yerevan. Attempts to create statehood and gain independence were made, and in May of 1918 Azerbaijani Democratic Republic (ADR) and later on Armenian Democratic Republic (ArDR) were proclaimed, although the latter at the time did not have its own territory. Later on ADR yielded Yerevan to ArDR and Dashnaks (members of The Armenian Revolutionary Federation party) started to displace Muslim population out of the Nakhjivan, Karabakh and Yerevan regions, which they saw as historically Armenian⁹⁹. Nevertheless those republics did not enjoy their independence for long and were forcefully included into USSR in the 1920-21.

In the first years after establishing Soviet rule territorial delimitations took place: Karabakh and Nakhjivan were left to Azerbaijan SSR, while Zangezur was transferred to Armenian SSR; NK was granted an autonomous status and was called Nagorno-Karabakh Autonomous Oblast (NKAO), with majority of ethnic Armenians within Azerbaijani SSR; Nakhjivan also received status of an Autonomous Republic within Azerbaijan. Despite all those determinations Armenians continued their struggle for control over NKAO and Nakhjivan and constant attempts were made by sending off various petitions to the central authorities in Moscow; moreover Armenian leaders (in Armenian SSR and NK region) started voicing their demands for the unification of NK and Armenia, leading to constant tensions between two soviet republics during Soviet period and after¹⁰⁰.

3.2 Outbreak of new territorial claims and rise of ethnic hostility.

At the end of 80th nationalist movements across USSR increased and conflict over NK escalated with a new force. The activation of the conflict between Azerbaijan and Armenia started with mass demonstrations and political rallies, multiple resolutions from Armenian side

⁹⁷ Cornell, p.5-6.

⁹⁸ Kruger, p.10.

⁹⁹ Cornell, p.7.

¹⁰⁰ Cornell, p.8-12.

in NK (Stepanakert), in Armenia (Yerevan), where representatives of Armenian intelligentsia, parliamentary and working class were demanding territorial annexation of NK to Armenia. Moscow rejected all petitions and claims for incorporation and dispatched motorized battalion of Soviet Interior Ministry to the region¹⁰¹. Azerbaijani side also started protesting, and on 22 of February of 1988 in NK in interethnic clashes between villagers two Azeri men were killed. Moreover during this period a case of rapes in Stepanakert of two Azeri girls was registered¹⁰².

However, the first clashes took place already in 1987, in the small village Chardakhlu, north of Azerbaijan, and was followed by demonstrations and new clashes in Armenia, Kafan and Meghri, what resulted in the total expulsion of Azeri civilians from those villages. Witnesses testify that the first refugees arrived to Baku in November 1987 and in January 1988¹⁰³. Appearance of the first refugees triggered pogroms and violent deportations of population from both sides: of ethnic Armenian residents from Azerbaijan and ethnic Azerbaijani residents from Armenia. One of the most brutal considered Sumgait (Azerbaijani city) pogrom, taking place in February of 1988, where the number of killed reached thirty-two, with twenty six of Armenian ethnicity and six of Azeri, with hundreds of wounded, what resulted in almost total removal of ethnic Armenian population from the city¹⁰⁴.

In May 1988 Armenian proposals of creating NK Autonomous Republic were rejected by Moscow, leading to another wave of clashes and flow of refugees from Stepanakert, Yerevan and other populated by ethnic Azeri's territories. As was expressed by De Waal: "... Armenians turn{ed} against their Azerbaijani minority and expel{led} them from Armenia ...gangs raided Azerbaijani villages; many of their residents were beaten, shot, had their homes burned, or were forced to flee on foot... and dozens of Azerbaijanis had died in a savage...". Researches indicate the total death rate of 216 (who was murdered and died while fleeing)¹⁰⁵.

Displacements with participation of local authorities were common: in Spitak region (North Armenia) in November 1988 local officials ordered Azeri population to leave, upon refusal to obey, armed gangs were sent against them and population was deported via organized buses. It is considered that more than 200,000 Azeris and Muslim Kurds were expelled from the Armenian countryside. Another way of organized deportation of civilians was establishing by

¹⁰¹ De Waal, p.10-12, 20-25.

¹⁰² Ibid, p.14-15.

¹⁰³ Ibid, p.18-19.

¹⁰⁴ HRW, Seven Years of Conflict in Nagorno-Karabakh, p.1 and De Waal, p.29-45, particularly p.40.

¹⁰⁵ De Waal, p.62-63.

both parties of the system of exchanges, where through the connections between party leaders and members of local authorities, both sides arranged conditions of “safe removal” of civilians. As for instance in Jermuk, from where 1000 Azeris fled by bus and train, and in return 700 Armenians, fleeing Baku and Mingeaur, were settled¹⁰⁶.

Meanwhile Baku drowned in political struggle for power, leading to another round of clashes and triggering deployment of USSR Ministry of Interior (MVD) troops on the night of 19-20 January of 1990, resulting in the death of more than 130 civilians¹⁰⁷.

According to Human Rights Watch (HRW) Report, alleged process of creation of paramilitary groups in NK led to massive operation, conducted in summer of 1991 by Azerbaijani authorities (Special Function Militia Troops-OMON) and Soviet army deployed in the region, leading to displacement of many ethnic Armenians¹⁰⁸.

3.3 Escalation to the war, occupation process.

Azerbaijan and Armenia declared their independence from USSR and elected first presidents in August-October of 1991, what was followed by formal break-up of the USSR in December 1991. New States formally inherited old borders, as within Union existence, thus NK was internationally recognized as territory of newly proclaimed Azerbaijan Republic. Meanwhile NK problem was not resolved and now according to De Waal, “Armenians risked international opprobrium by laying claim to a part of an independent country, they sidestepped this problem by declaring NK “independent”-thus no longer responsibility of Yerevan”. Local authorities of NK declared the independence of “Nagorno-Karabakh Republic” from Azerbaijan on September 1991 and conducted a referendum, in which Karabakh Azeris did not participate¹⁰⁹. With dissolution of the USSR, Armenians and Azerbaijanis were left face to face, upon withdrawal of Soviet troops from the region.

In the beginning of 1992 Armenians began advancement on Azeri populated cities and villages within NK. The city of Khojali was important, as it had regional airport what could establish direct connection with mainland Armenia. Khojali in 1991 had a population between 6,300 and 7000 (according to De Waal and Cornell), nonetheless it was in blockade within NK, surrounded by Armenian villages and paramilitary forces, so the airport was the only mean of

¹⁰⁶ Ibid.

¹⁰⁷ Ibid, p.89-93.

¹⁰⁸ HRW, Bloodshed in the Caucasus p.7-10. and De Waal, p.113-124.

¹⁰⁹ De Waal, p.161.

communication with the rest of Azerbaijan for Azeris. It was considered that around 3000 (not conclusive number) civilians were still in the city in February of 1992, while the number of the present militiamen (self-defense groups and some OMON militiamen) in the city is unknown, according to different sources there were as few as 22 and as many as 200 men¹¹⁰.

On the night of 25-26 February of 1992 Armenian assault, which was allegedly supported by ex-Soviet 366th Regiment (all ex-soviet troops' members, as well the one concerned, at the collapse of the USSR, became mercenaries and upon payment participated in different military operations and traded their weapons and equipment's)¹¹¹, began against town of Khojali (the author will not comment further on the character of the involvement of ex-soviet troops as this falls outside of the scope of this paper). Armed vehicles surrounded the town from three sides and entered the city. Civilians fled through the only left corridor, among which one of the groups, trying to reach the nearest Azeri city of Agdam, reached the outskirts of the Armenian village Nakhichevanik and encountered Armenian militiamen, subjecting them to the wall of gunfire. Those, who survived the shelling, later shared the details and their evaluations of how many died during that incident. Still, approximate numbers of how many died, was impossible to conclude, as the bodies remained in the non-reached zone controlled by Armenians¹¹².

According to the local religious leader in Agdam there were 477 registered dead on the first days after massacre. It was incomplete list, who was reported by their families and those, whose bodies were in the morgue in the local mosque; nonetheless it did not include those, who was considered missing and presumed dead, whose families were entirely annihilated, so there was nobody to report on their death¹¹³. There are several theories of how many people were considered killed: Azeri official investigation put the death toll over 600, western journalists, present at the time¹¹⁴, - between 400 and 500, human rights (HR) organizations have figures between 200 and 1000¹¹⁵.

¹¹⁰ Ibid, p.170.

¹¹¹ Ibid, p.167 and 201.

¹¹² Ibid, p.169-172, also HRW, Bloodshed in the Caucasus, p.19-24.

¹¹³ Goltz, Azerbaijan Diary, p.130, it was also unofficially confirmed by the local, Agdam-based representative of the ICRC on the basis of the number of body bags supplied by them.

¹¹⁴ For more details reference to the sources as Thomas Goltz, "Armenian Soldiers Massacre Hundreds of Fleeing Families", *The Sunday Times*, 01/03/1992; Anatol Lieven, "Corpses Litter Hills in Karabakh", *The Times*, 02/03/1992; "The Face of a Massacre", *Newsweek*, 16/03/1992; "Massacre by Armenians", *The New York Times*, 03/03/1992; *The Age*, (Melbourne), 06/03/1992 is of great relevance.

¹¹⁵ HRW, Seven Years..., p.6, note 28.

The next assault, against city of Shusha took place on 8th of May 1992, resulting in the fall of the city and in the death of approximately three hundred men. Mainly it was losses on Azeri side, according to some evaluations there were 58 Armenian and 200 Azeri losses¹¹⁶. This capture signified total occupation of NK region by Armenians. After, Armenians moved towards Lachin, situated just in the narrow corridor between NK and Armenia, and on 18th of May captured the city, by that territorially connected NK to Armenia. This seizure was seizure of the Azerbaijani territory proper, as Lachin situated outside NK region.

On 27th of March 1993 Armenian offence against Kelbajar, city located on the North-West between NK and Armenia, began. During a week 60.000 people fled, many civilians were taken hostages and killed. Fleeing civilians were targeted with Grads¹¹⁷ and machine guns, while the other part was trapped, as the only available route of escape was through a snowy road north, across Murov Mountains, where people simply perished from the cold (according to some sources around 200 people died while crossing the mountains). This resulted in a new wave of thousands of refugees. Upon acquisition of Kelbajar again direct territorial connection of Armenia and NK was established¹¹⁸. Armenians continued their advances and on 23rd of July captured Agdam, which had around 50 000 population of Karabakh Azeris¹¹⁹.

Armenian offence continued and during August-October of 1993 they seized southern provinces of Azerbaijan, bordering with NK and Republic of Iran: Fizuli, Jebrail, Qubatlil and Zangelan, with its population 300 000, which was respectively displaced. This occupation caused new wave of refugees, who were trapped in the southern part of Azerbaijan between Araks River in south- border with Iran, Armenia from the west and Karabakh Armenian forces, coming from the North. They were forced to cross the river to get to Iran, many of whom drowned¹²⁰. In August ICRC reported about 60,000 displaced people from Fizuli and Jebrail region only¹²¹.

Although during 1992-93 Azeri forces undertook several contra attacks, even gaining some advantages, those situations were fast reversed and from the beginning of 1994 Azeri forces were pushed back, while Armenians were capturing more villages, resulting in the new

¹¹⁶ De Waal, p.314, note 44.

¹¹⁷ Grad is rocket launcher, which is not very accurate, has been widely deployed during the course of the conflict.

¹¹⁸ HRW, Seven Years...,p.12-26.

¹¹⁹ Ibid, p.35.

¹²⁰ Ibid, p.50-52.

¹²¹ Ibid, p.61.

flows of refugees. The final cease-fire agreement was enforced in May 1994, what put an end to an active combat.

Chapter 4: Defining factual circumstances of Nagorno-Karabakh conflict in relation to the law of armed conflicts.

From the historical summary of the conflict in NK we see that confrontations began at the end of 80th (87-88) when both States were members of the USSR. In light of these facts assuming that hostilities obtained necessary level and crossed the threshold of AC, this conflict will be considered as being internal in nature, as it was initiated within USSR. Further on, through the development of the conflict, upon dissolution of the Union (in 1991), carried out armed hostilities, if satisfied the required level of intensity, ought to be classified within the framework of IAC's, since at that period taking place between independent states.

As discussed previously in chapter two, requirements of organization of the parties and intensity or protraction of violence were established as necessary criteria, in order to pronounce on the existence of AC of any nature. In this way satisfaction of those requirements in NK, warrants application of the rules and principles of IHL in the case of conflict in NK.

In this respect period of 1987-1991 will be assessed to determine whether hostilities of that period qualified as NIAC within framework of CA 3. The choice of this legal framework is due to customary nature of the article to apply “elementary considerations of humanity” in the case of NIAC's; furthermore the threshold of application of this article is lower than of one, required under AP II. In this way establishment of the concepts of organization of the parties and intensity/protraction of armed violence will satisfy application of CA 3.

In respect of period of 1992-1994 (after dissolution of the USSR and appearance of new independent States until final cease-fire agreement) assessments will be done to determine whether hostilities carried out in that period amounted to IAC within framework of GC's.

4.1 Determinations in respect of 1987- 1991.

As was described previously, increased confrontations between Azerbaijan and Armenia within USSR started with demonstrations and political rallies in Stepanakert (NK), Yerevan (Armenia), demanding secession of NK from Azerbaijan and its annexation to Armenia. Those demonstrations led to hostilities between different communities and resulted in ethnic clashes in NK region and cities and villages within Azerbaijan and Armenia. Moreover those confrontations were conducted with corresponding displacement of civilian population, residing in those territories. In this respect it is necessary to comment on the character of the violence in

this period, whether it reached necessary level of intensity or protraction; as well on the level of organization of the parties concerned.

4.1.1 Intensity/protraction of violence:

ICTR jurisprudence pronounced regarding notion of protraction, that violence extending over a view months satisfies criteria of protraction within CA 3. Thereby, consideration of the entire duration of violence in the period of 1987-1991, can be regarded as reaching the threshold of protraction, as propounded by ICTR. Nevertheless it is of necessity to comment on other features of the notion of intensity. Previous case law emphasized such criteria as, seriousness of attacks, increase of armed clashes, spread of clashes over the territory and time, quantity of government units and troops sent to the crisis area, mobilization and distribution of weapons, such as rifles, guns and mortars, usage of heavy weapons and military equipment's such as tanks, number of casualties, number of civilians fleeing the combat zone and etc.¹²²

Spread of clashes over territory was obvious, since it took place simultaneously in Armenia, Azerbaijan and NK region. Upon development of hostilities clashes also increased, dispatch of Soviet MVD troops to the region and respective republics took place continuously. Already in July 1988 MVD troops were sent to Yerevan to impose curfew¹²³; HRW Report indicated that in January 1989 Moscow placed NK region under its direct rule through those troops, nevertheless clashes continued between ethnic groups and between those troops and local residents. On January 1990, roughly 17.000 additional MVD troops were sent to NK and to the Armenian-Azerbaijani border and simultaneously USSR troops stormed Baku in 19-20th of January, where they used, according to HRW, brutal force against unarmed residents killing over hundred people¹²⁴. By summer of 1990 Soviet military checkpoints had been set up on all roads within NK region. According to HRW, an estimated 115 attacks on law enforcement officials, military outposts and military patrols took place between January and May of 1991, during which weapons and military equipment was stolen by groups from both sides¹²⁵. Interesting to mention description of situation - level of violence at that time, given by Soviet officials, "not a day went by without gunfire, explosives, mine blasts, arson and pogroms"¹²⁶.

¹²² See chapter 2, discussion in section 2.3.2 (i).

¹²³ De Waal, p.62.

¹²⁴ HRW, Seven years of Conflict..., p.1-2.

¹²⁵ Ibid,p.4.

¹²⁶ Ibid,p.3, note 22.

HRW also emphasized that there was an open flow of arms facilitating formation of paramilitary forces of self-defense of ethnic Armenians in NK¹²⁷. De Waal pointed out to interviews, in which state agency workers from Yerevan acknowledged the process of the flow of weapons to the region. One of the examples describes efforts of some official (Muradian) in gaining weapons already in 1986, and further points out to a system, established by him, of acquisition and forwarding of various weapons to the region on regular basis. This led to the arming of all organizations in the region¹²⁸. Also were emphasized tacit approval and support of those activities by senior party figures in Armenia¹²⁹.

As to the number of civilians fleeing, according to De Waal, by the end of 1988 - 200,000 Azeris were displaced from Armenia¹³⁰, where only in November of 1988 unofficial sources highlighted the biggest refugee flow, around 180,000 Armenians from Azerbaijan and 160,000 Azeris from Armenia¹³¹. By the end of 1989 all remaining Azeris in Armenia were expelled¹³²; where researches indicate that for period of 1988 the number of murdered reached 127 (who was beaten, burned or killed), while the total death toll reached the number of 216, including people who died while fleeing.¹³³

Violent clashes in 1987-1991 occurred continuously over wide territory (Azerbaijan, Armenia and NK), resulting in casualties, death, displacement of thousands of people. Presence of military troops from central authorities (Moscow) was continuous during the whole period; moreover mediation attempts were undertaken by foreign representatives and produced cease-fire agreement in September 1991 between republican leaderships, which nonetheless was fragile and was violated in two months¹³⁴. These facts, in my opinion, point out to the level of intensity, between Soviet republics, crossing the threshold required within framework of CA 3.

4.1.2 Organization of the parties:

It is possible to discern level of organization through the processes taking place during the period concerned, with the main reference to the processes of displacement, occurring continuously in the mentioned territories. Example of organization and realization of

¹²⁷ Ibid,p.5.

¹²⁸ De Waal, p.18.

¹²⁹ Ibid,p.21.

¹³⁰ Ibid, p.62.

¹³¹ Cornell, p.20.

¹³² De Waal,p.62.

¹³³ Ibid, p.62-63.

¹³⁴ Cornell, p.26-27.

displacement of ethnic Azeris from Spitak (Armenia) were carried out by KGB officials, local party boss and police chief¹³⁵. The same applies to the established system of exchanges of civilian population, conducted by representatives of local authorities between two republics.

According to De Waal, clashes in Sumgait in February 1988 were conducted by instigation and careful planning of the authorities, both local Azeri and central Moscow. In his work he suggests several conspiracy theories related to the events, which resulted in total removal of ethnic Armenians from the city¹³⁶. Furthermore participation of local authorities in the clashes in January 1990 in Baku was described in the way of support (provision of detailed lists of persons of Armenian ethnicity, residing in Baku with their addresses) to the armed groups, who attacked local Armenian residents, or intentional non-interference of local police and soviet troops in the violent clashes¹³⁷.

Soviet officials, at the time present in NK region, admitted “The second half of 1989 began with the handing out of weapons,” (said Volsky), and that led, as De Waal emphasized, to escalation of hostilities, as the process of formation of paramilitary groups on both sides went faster with reception of weapons, where tactics included disruption of the bridges, blockage of the roads, taking of the first hostages¹³⁸. Central authorities tried to prevent this process as Gorbachev (president of the USSR) signed a decree “On the Prohibition of the Creation of Armed Formations” in 25 July 1990, which, as De Waal pointed out, was primary aimed at Armenia. In 1989 militia groups such as The Armenian Army of Independence (AAI) and The Armenian National Army (ANA) emerged, which together had two thousand men under arms, stolen or bought from Soviet bases¹³⁹. Moreover one of the leaders of the groups became Armenia’s interior minister in 1991 and “helped {Karabakh} paramilitaries by giving them illicitly bought weapons and transport”¹⁴⁰. HRW also emphasized this process in NK, which only increased clashes between Azeris and Armenians, leading to another massive operation, conducted by OMON-Azerbaijani Forces and Soviet troops, resulting in displacement and casualties of ethnic Armenians¹⁴¹.

¹³⁵ De Waal, p.63.

¹³⁶ Ibid, p.41-45.

¹³⁷ Ibid, p.90-91.

¹³⁸ Ibid, p.71.

¹³⁹ Ibid, p.111-112.

¹⁴⁰ Ibid, p.115.

¹⁴¹ HRW, Seven Years...,p.5-6.

Armenian Interior Minister at 1991 admitted in further interviews: “Because we had been forced to create everything in secret, invisibly, in spite of the Soviet authorities, everything that was created turned into an army”¹⁴². Moreover under Soviet legislation, Union Republics had the right to form their own special police forces, which were legalized paramilitaries, for Azerbaijan it was OMON and Armenia – OMOR¹⁴³.

Reports of HRW and researches, conducted by international correspondents, pointed out to: active participation of state agents of both republics in the processes of displacement and violent clashes, in their gaining of weapons and military equipment, to be dispatched to the region; the process of creation of paramilitary groups on both sides, with their corresponding arming; the establishment of zones of military checkpoints and constant presence of the military troops, sent from Moscow, engaged in numerous clashes throughout the whole territories concerned; the participation of republics’ armed forces in numerous operations and clashes (whose organization is already presumed as being State forces of Union Republics). All these developments (as level of organization is to be determined on case-by-case basis) indicate, in author’s opinion, the minimum level of organization (as stipulated by ICRC and ICTY)¹⁴⁴.

In respect of these determinations, it is of my opinion that, hostilities during the period 1987-1991 were of such nature, as qualifying for NIAC within CA 3. Violence which mainly occurred between Union Republics (Azerbaijan and Armenia, as expressed in clashes and displacement of ethnic minorities from respective territories), and in NK region, reached the level of AC (satisfying criteria of intensity and organization), nonetheless being members of the USSR those hostilities are to be regarded as NIAC.

4.2 Determinations in respect of 1992-1994.

With USSR’s dissolution, hostilities between independent states are to be regarded as IAC. Nevertheless the situation was complicated due to Armenia’s allegations that it was not engaged in the conflict, which was taking place between NK Armenians and Baku, by that presenting NIAC, and Armenia here was only a concerned neighbor.

Upon official dissolution of USSR, Soviet troops withdrew from the territories, leaving and selling their weapons and military equipment to the parties, leaving paramilitary groups face

¹⁴² De Waal, p.164.

¹⁴³ Ibid, p.110.

¹⁴⁴ See, chapter 2, section 2.3.2 (ii).

to face with each other (those of the troops which did not leave in the first months, participated in the operations on the different sides upon payment)¹⁴⁵. From 1992 the conflict developed in the manner of occupation of villages and cities in NK region, with corresponding displacement of Karabakh Azeris from the area. Although during 1992-93 Azeri armed forces undertook several contra attacks, gaining some success, those instances were short lived. In this way the necessary attention should be given to the parties of those hostilities.

Through the reading of HRW reports and investigations of correspondents we see that Azeri part was presented by OMON forces and paramilitary groups, acting together in military operations, supported by government and provided with weapons and heavy military equipment, by this, in author's opinion, being qualified as armed forces of the State. The main concern is related to the representation of the Armenian party. At the beginning of occupation process, in 1992, paramilitary forces, created in the early stages of NIAC in Armenia (as was described previously), were taking leading role in hostilities. Due to Armenia's political allegations of non-involvement, it was considered that those paramilitaries were Karabakhi armed groups, especially for the time of first attacks and operations. In this way it is necessary to understand whether those armed forces were acting as Armenian armed forces or as Karabakhi forces. Therefore, it is important to refer to the interviews of high officials of Armenia, conducted by De Waal in the following years (2000) and indicated in his research.

As Robert Kocharian (ex-president of Armenia) admitted "When [the Soviet] forces withdrew we were left one on one with Azerbaijan, one on one, but organized and having as a minimum three or four years of experience of underground activity"¹⁴⁶. From interview with current president of Armenia Sarkisian "But I think the main point is something different. Before Khojali, the Azerbaijanis thought that they were joking with us, they thought that the Armenians were people who could not raise their hand against the civilian population. We were able to break that [stereotype]. And that's what happened..."¹⁴⁷.

From the interview with Armenian Defense Minister at 1992 "You can be sure that whatever we said politically, the Karabakh Armenian and Armenian army were united in military

¹⁴⁵ HRW, Seven Years...,p.6.

¹⁴⁶ De Waal,p.166.

¹⁴⁷ Ibid.,p.172.

actions. It was not important for me if someone was a Karabakhi or an Armenian”, he acknowledged that on several occasions he deliberately ordered Armenian military into action¹⁴⁸.

The arming of both parties was done on official level, when, in May 1992, at the meeting in Tashkent (Uzbekistan), representatives of Armenia and Azerbaijan formally inherited vast amounts of Soviet weaponry, as their due from dividing Soviet army, where States acquired 220 tanks, 220 other armed vehicles, 285 artillery pieces, and 100 combat aircrafts¹⁴⁹.

It is necessary to refer to HRW investigation, regarding involvement of Armenia in the conflict. According to HRW, Armenia was supporting Karabakh forces since the beginning. The overt participation was revealed during occupation of Kelbajar, when bombardment came from the side of Armenia and soldiers, on the active duty in Armenian Republican forces, acknowledged transporting ammunition to the region for fighting. HRW concluded that Armenian Republican armed forces participated in the operations in Azerbaijan during December 1993, April and May 1994. Some captured POW's, interviewed by HRW, told that they were enlisted in Armenia and sent for fighting in Karabakh, others told that they were participating in transportation of army soldiers to the front to Kelbajar, among whom some soldiers did not even know where they were sent¹⁵⁰. Furthermore, it was pointed out that police members of the Republic of Armenia were sent to the occupied territories of Azerbaijan to perform police duties. From the interviews, conducted in the streets of Yerevan, HRW researchers found out that 30 percent of the soldiers, to whom they talked at random, were regular recruits from Armenian Army fighting in Karabakh¹⁵¹. HRW also highlighted increased requirements for draft in military in Armenia at the period concerned, with corresponding provision of obligatory military training for men at age between 25-45, and imposition of strict passport control, forbidding men leave the country without special permission. Some of the interviewed draftees told HRW that they were sent to Lachin and Kelbajar areas for fighting. Moreover workers of HRW on a single day counted 5 buses full of Armenian Army soldiers entering NK, holding around 300 men in all; when interviewing them, after first denials, commanders acknowledged that they were heading to NK, since “it was their land and needed to be defended”. HRW pointed out that many other international correspondents witnessed the

¹⁴⁸ Ibid, p.210.

¹⁴⁹ Ibid, p.197.

¹⁵⁰ HRW, Seven Years, p.22,113-118.

¹⁵¹ Ibid, p.119.

similar situations of the flow of army to the region¹⁵². In this respect HRW concluded that Armenian army troops' involvement in Azerbaijan makes Armenia a party to the conflict and makes the war an IAC between these states¹⁵³.

According to Cornell over 85 % of the budget of Karabakh was provided by government of Armenia, which spent 5-10% of its national income on Karabakh¹⁵⁴. Furthermore, during the whole period of hostilities (1992-1994), there were several attempts to mediate a cease-fire agreement between republican leaders by international envoys. OCSE attempts to negotiate peace between two republics started gaining power in 1992. UN SC passed four resolutions (822,853,874,884) on the matter in 1993, where it called on both sides to cease hostilities and condemned occupation by armenian forces, demanding "immediate withdrawal of all occupying forces"¹⁵⁵. Furthermore HRW report emphasized that between 1988 and 1994 an estimated 750,000-800,000 Azeris were forced out of NK, Armenia and seven other Azeri provinces now occupied¹⁵⁶.

All these facts point out, in author's opinion, to the existence of IAC between concerned States in the period of 1992-1994. While at the beginning, all activities were underground in Armenia, nevertheless from 1993 open participation of Armenian Army forces was proved. In this way it is possible to discern criteria of overall control, for classifying the conflict as international, which is expressed through financing, provision of weapons, training of militiamen and general control by Armenia at the first stage of occupation. Further on, through the development of the conflict, these underground activities smoothly transformed into an open participation from 1993.

¹⁵² Ibid, p.120-123.

¹⁵³ Ibid, p.125.

¹⁵⁴ Cornell, p.33.

¹⁵⁵ HRW, Seven Years..., p.27,48,67,77.

¹⁵⁶ Ibid, p.97.

Chapter 5: Rules pertaining to and the status of protected persons upon the changed status of armed conflict.

It is interesting to observe how the changed nature of AC can affect the legal status of protected persons. In this instance it is necessary to elaborate on the rules serving protection of protected persons (here civilians) both during NIAC's and IAC's. After clarification of the rules of warfare and rules pertaining to the protection of civilians during any type of AC's, it is possible to proceed to the matter related to the changed nature of the AC and observe the corresponding change in the application of the legal regime pertaining to the regulation of the status of protected persons. By this, determinations on the legal regulation of the status of protected persons, upon the changed nature of AC, will be possible.

5.1 Developments of IHL pertaining to the protection of civilians.

5.1.1 Customary status of the principle of distinction.

Protection of civilians constitutes the basics of the whole field of IHL being read within fundamental principle of distinction between civilians and combatants, between members of armed forces and persons not taking active part in hostilities. This distinction is of genuine importance due to prohibition of any attacks against civilians and persons not taking active part in hostilities. Principle of distinction and prohibition of the attack against civilians was expressed in the rule 1 of the Customary International Humanitarian Law (CIHL), codified by ICRC, and established through state practice as a norm of customary international law (CIL) applicable both in IAC's and NIAC's¹⁵⁷.

The origins of the principle are found already in the 19th century in the Lieber Code¹⁵⁸, and in the Hague Regulations No II and IV (from 1899 and 1907). Nevertheless explicit stipulation on illegality of attacks against civilians and persons not directly participating in hostilities was done by resolutions of international organizations: UN GA Resolution 2444 (XXIII) from 1968, UN GA Resolution 2675, entitled "Basic Principles for the Protection of Civilian Populations in Armed Conflicts" from 1970 and etc.

Meanwhile legal codification of this principle was finally allocated in AP I, in Articles 48, 51(2) and 52(2), as related to prohibition of attacks against civilians during IAC's; and Article 13(2) of AP II, related to prohibition during NIAC's. Later prohibition of attacks against

¹⁵⁷ ICRC, Customary International Humanitarian Law, Volume I: Rules, p.3.

¹⁵⁸ ICRC, Commentaries on the AP's, para.1823.

civilians was also laid down in the Rome Statute, in articles 8(2)(b)(i) and 8(2)(e)(i) as constituting a war crime within IAC's and NIAC's respectively.

In practice this principle was used in the Kassem case in 1969¹⁵⁹; was respected during conflict in the Middle East in 1973(when AP I was not adopted yet) between Egypt, Syria, Israel and Iraq¹⁶⁰; prescribed in national legislation (national military manuals) of some States, as for instance Argentina's Law of War Manual from 1989 (in respect of NIAC's)¹⁶¹ and Swedish IHL Manual from 1991(in respect of IAC's), where the latter manual also stipulated that principle of distinction, expressed in Article 48 of AP I, represent part of CIL¹⁶².

All these developments indicate that principle of distinction and corresponding prohibition of attack against civilians and persons not engaged in hostilities, both in IAC's and NIAC's, became strongly established norms of the customary law already for the period of 1988. Customary status of the principle was supported by ICJ jurisprudence¹⁶³. By this understanding of the concept "civilian" is necessary for realization of the mentioned principle of IHL.

5.1.2 Definition of the concept "civilian" and rules pertaining to the protection of civilians.

i) Civilian population in IAC's.

The concept "civilian" was properly defined in Article 50 of AP I: "*A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1),(2),(3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian...*" This definition is expressed through negative assertion, where civilians are people who are not members of the armed forces of a party to a conflict nor participants in a levee en masse (whose status is regulated by articles mentioned above (Art.4A(1),(2),(6) of GC III and Art.43 of AP I)). According to ICRC, concepts of civilian, armed forces and levee en masse are mutually exclusive, where notion of civilian is negatively delimited by definitions of armed forces and levee en masse within IHL instruments¹⁶⁴.

¹⁵⁹ CIHL, Volume I: Rules,p.4.

¹⁶⁰ Ibid, p.5.

¹⁶¹ CIHL, Volume II: Practice, Part I, p.24, para.173.

¹⁶² Ibid, p.6, para.29.

¹⁶³ Supra note 8, ICJ, Nuclear Weapons AO, para.78.

¹⁶⁴ ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, (ICRC Guidance), p.21.

By “armed forces” of a party in IAC is understood all organized armed forces, groups and units, which are under a command responsible to that party for the conduct of its subordinates, i.e. armed actors showing a sufficient degree of military organization and belonging to a party to the conflict must be regarded as part of the armed forces.

“Levee en masse” - all inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war¹⁶⁵. “Levee en masse” is excluded from notion of civilian population, whereas all other persons, directly participating in hostilities on a merely spontaneous, sporadic or unorganized basis, regarded as civilians¹⁶⁶.

ICRC suggests that “apart from the members of the armed forces, everybody physically present in a territory is a civilian”¹⁶⁷.

ii) Civilian population in NIAC’s.

In NIAC’s all persons, who are not members of state armed forces or organized armed groups (armed forces of a non-State party with individuals whose continuous function is to take a direct part in hostilities ("*continuous combat function*")) of a party to the conflict, are civilians¹⁶⁸.

CA 3 and AP II suggest that civilians, armed forces, and organized armed groups are mutually exclusive categories also in NIAC’s¹⁶⁹.

Within AP II (art.13) "civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations" carried out by state’s "armed forces", "dissident armed forces", and “other organized armed groups” “unless and for such time as they take a direct part in hostilities”¹⁷⁰.

Within CA 3 concept of civilian implies “persons taking no active part in the hostilities” i.e. not members of the armed forces of a party to the conflict - individuals “who do not bear arms” on behalf of a party to the conflict¹⁷¹. Under armed forces here understood State armed

¹⁶⁵ GC III, Art. 4(6).

¹⁶⁶ ICRC Guidance, p.25.

¹⁶⁷ ICRC, Commentary on the AP’s, para.1917.

¹⁶⁸ Supra note 166, p.27.

¹⁶⁹ Ibid, p.28.

¹⁷⁰ APII, art.1(1) and 13(1)and (3).

¹⁷¹ ICRC, Commentary to GC IV, p.40.

forces, dissident armed forces and other organized armed groups, where the last two are armed forces of non-State party, or simply organized armed groups¹⁷².

State armed forces (under AP II) include both the regular armed forces and other armed groups or units organized under a command responsible to the State (members of the National Guard, customs, or police forces)¹⁷³. Dissident armed forces constitute part of a state's armed forces that have turned against the government, while other organized armed groups recruit their members primarily from civilian population, but develop a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict¹⁷⁴.

Members of organized armed groups fulfill continuous combat function (hereafter CCF), which does not imply de jure entitlement to combat privileges, but distinguish members of the organized fighting forces of a non-State party from civilians, who are directly participating in hostilities on a merely spontaneous, sporadic or unorganized basis. In this way CCF requires lasting integration into an organized armed group, acting as armed forces of a non-State party to an AC, where functions of individuals involve preparation, execution of acts or operations, amounting to direct¹⁷⁵ participation in hostilities. Meanwhile individuals, who continuously accompany or assume support function to organized armed groups, but functionally don't directly participate in hostilities (like contributing to the general war effort: private contractors, civilian employees accompanying state armed forces, recruiters, trainers, propagandists, persons dealing with purchase, manufacture and maintaining of the weapons) are not members of that group and remain civilians¹⁷⁶.

5.1.3 Rules pertaining to the protection of civilians.

In this respect, general protection of civilian population and individual civilians from the dangers of hostilities, mainly from military operations, is represented through an absolute prohibition of direct attacks against civilians and reduction of incidental losses from military operations to the minimum possible degree¹⁷⁷. In this way protection of civilians is discerned from CA 3, AP II (art. 13) during NIAC's and GC IV and AP I (mainly art. 51) during IAC's.

¹⁷² ICRC Guidance, p.30.

¹⁷³ ICRC, Commentary on the AP's, para.4462.

¹⁷⁴ Supra note 172, p.31-35.

¹⁷⁵ Terms "direct" and "active" refer to the same quality and degree of individual participation in hostilities, therefore synonymous, from ICRC Guidance, p.43-44.

¹⁷⁶ Ibid, p.33-34.

¹⁷⁷ ICRC, Commentary on the AP's, para.4766-4771.

Moreover attacks, purporting to terrorize civilians, are another type of attacks inflicting cruel suffering, proscribed in IHL and incorporated into rule 2 of CIHL: “acts or threats of violence the primary purpose of which is to spread terror among civilian population are prohibited”. This rule as a norm of CIL, applicable both in IAC’s and NIAC’s, is codified in articles 51(2) of AP I and 13(2) of AP II¹⁷⁸.

Nevertheless there is an overriding condition when civilians can lose their immunity from direct attacks, situations of direct participation in hostilities, as was expressed in numerous instruments mentioned above (art. 51(3) of AP I and 13(3) of AP II), which now became an established rule 6 of CIL, applicable both in IAC’s and NIAC’s¹⁷⁹. Therefore it is necessary to elaborate on the mentioned concept of IHL (hereafter DPH).

5.1.4 Direct participation in hostilities.

IHL treaties do not define notion of DPH; nevertheless this concept is directly connected to the law of AC’s. According to ICRC, notion of DPH refers to specific acts, carried out by individuals, as part of the conduct of hostilities between parties to an AC. Notion of DPH is comprised of two elements, that of "hostilities" and that of "direct participation" therein, where the concept of "hostilities" refers to the (collective) resort by parties of the conflict to means and methods of injuring the enemy; "participation" in hostilities refers to the (individual) involvement of a person in these hostilities, and this involvement depending on the quality and degree, could be described as “direct” or “indirect” (not discussed in this paper) participation. The concept of DPH has the same essence for IAC’s and NIAC’s¹⁸⁰.

For qualification as DPH, a specific act must meet following cumulative criteria: first, the act should reach required threshold of harm, i.e. adversely affect to military operations or military capacity of a party to an AC or, inflict death, injury, or destruction on persons or objects, protected against direct attacks; second, there must be a direct causation, i.e. direct causal link between the act and the harm, resulting either from that act, or from a coordinated military operation of which that act is an integral part; third, there should be belligerent nexus, i.e. the act must be specifically designed to directly cause required threshold of harm in support of a party to the conflict and to the detriment of another. In this way, belligerent nexus does not represent state of mind of each individual person concerned, but only relates to the objective purpose of

¹⁷⁸ CIHL, Volume: I Rules, p.8-9.

¹⁷⁹ CIHL, Volume I: Rules, p.20-21.

¹⁸⁰ ICRC Guidance, p.43-45.

the act, independent of personal distress, preferences or mental ability of persons involved in that act. Only in conjunction these three criteria constitute activities amounting to DPH¹⁸¹.

Concept of DPH also includes measures preparatory to the execution of a specific act, deployment to and return from the site of execution of the act. In this way preparatory measures are so closely linked to the subsequent execution of a specific hostile act (since they are aiming to carry out a specific act) that they constitute an integral part of that act, regardless of temporal and geographical proximity to the site of execution of that specific act¹⁸².

5.1.5 IHL developments in respect of NK conflict.

Discussed above developments pointed out that principle of distinction and inherited from it protection of civilians against direct attacks and threats of violence, purporting to terrorize civilians, are established norms of CIL. Therefore it is clear that principle of distinction and inherited from it protection of civilians should apply in the situation of AC in NK. By this, the change in nature of NK conflict from non-international (occurring pre-1991) to international (post-1991) does not affect application of the principle of distinction and obligations on protection of civilians. Thereby, it is reasonable to conclude that, civilians as such remain protected against attacks of any type during the entire period of hostilities (during NIAC and IAC), as long as they don't directly participate in the hostilities. In this way, respect for the rules, pertaining to the protection of civilians, during the whole period of the conflict is imperative.

CA 3 is applicable from initiation of hostilities (from 1987-88), amounting to NIAC, and during its transition to IAC (as mentioned before, due to its customary nature and applicability in any type of conflict, as "elementary considerations of humanity"). It serves protection of civilians as "persons not taking active part in hostilities" (who are neither members of the State armed forces nor organized armed groups of a non-State party to the conflict). In this way CA 3(reinforced with article 13 of AP II) represents core of the rules, pertaining to the protection of civilians during NIAC's. Nonetheless, further transition of the conflict to international triggers application of the separate regime of law, pertaining to the regulation of IAC's, with corresponding to that regime rules, pertaining to the protection of civilians. In light of these developments, application of the GC's and specifically of GC IV relative to the protection of civilian persons in time of war, is of particular importance. In this respect, further elaboration on

¹⁸¹ Ibid, p.46-64.

¹⁸² Ibid, p.65-68.

the applicability of the conventions and particularly rules, pertaining to the protection of civilians in IAC's, upon transition of the conflict in NK, is necessary.

5.2 Legal gaps and transitional challenges?

In the case of discussion, appearing danger is that of legal gaps upon transition of AC to international. While States, as part of the USSR, were bound by GC's and AP's (ratified in 1954 and 1989 respectively) up to 1991, with dissolution of the Union newly emerged States (Azerbaijan and Armenia) declared their adherence to the treaties later on (in June 1993). In that respect, a threat of a gap in legal regulation is posed in relation to the hostilities, taking place in the period from August-December 1991 till June 1993. Therefore, it is necessary to comment on whether application of the GC's was triggered due to their humanitarian nature and respective developments in international law, and/or whether some rules, pertaining to the protection of civilians in IAC's in GC's, are applicable due to their customary nature.

In international legal doctrine there was developed a trend, centered on belief that there exist an international legal regime of state succession to humanitarian and human rights treaties - regime of automatic succession. The importance of this regime, according to Kamminga, lies in the fact that massive human rights (HR) violations almost always occur during the periods of political instability, which accompany State succession, or, as in the given case, in the situation of dissolution of the previous State and emergence of the new independent States. In such circumstances, there is an urgent need to know the precise extent of the international obligations, which are incumbent on successor States¹⁸³. Distinction made between newly independent and other successor States (such as continuator States, who continue the personality of the predecessor State) is important, since different legal consequences flow from it: "clean slate" (meaning an absence or freedom from any of the treaty obligations of the predecessor State) rule applies to newly independent States, while principle of continuity of treaty obligations applies to continuator States. Vienna Convention on Succession of States in Respect of Treaties (mostly dedicated to newly independent States) also points out to this distinction, offering little guidance to other successor States, defines "newly independent State" as a successor state¹⁸⁴, the territory

¹⁸³ Kamminga, *State Succession in Respect of Human Rights Treaties*, p.470.

¹⁸⁴ In this chapter the following usage of term "successor state" will be done in the meaning implying "newly independent state", (as propounded by Convention) which in respect of this chapter emerged as a result of dissolution of the previous state.

of which, immediately before the date of the succession of States, was a dependent territory, for the international relations of which the predecessor State was responsible¹⁸⁵.

5.2.1 Automatic Succession.

The term “automatic succession” is used in international law as implied and obligatory succession, which occurs regardless of volition of the successor state and without any steps being taken by that state. Its effect consists of the transfer of treaty rights and obligations not as result of the will of the successor state, but on the basis of operation of international law; by this it is succession *ipso jure* and formalities, such as sending of diplomatic notes, are not required¹⁸⁶. The idea of automatic succession was favored by W. Jenks, who pleaded that there can be no “clean slate” rule in respect of multilateral treaties of legislative or universal character. This idea was also supported by Kamminga, who found it difficult to see on what legal basis beneficiaries of HR, granted to them under a treaty, could be deprived of those rights simply because they have ended up under the jurisdiction of a successor state. This idea could be also endorsed through article 60 of the Vienna Convention on the Law of Treaties, which provides that provisions, related to the protection of human person, contained in treaties of a humanitarian character, may not be terminated or suspended in response to a breach by another part.

It was suggested that concept of automatic succession in legal theory may be based on the doctrine of acquired rights (meaning that private rights, among which are basic HR and fundamental freedoms, could be validly invoked against the successor state) which was applied by Permanent Court of International Justice (PCIJ)¹⁸⁷. Among international organizations ICRC has taken the view that a successor state is automatically bound by IHL instruments, which were binding on the predecessor state, unless the successor state has made a specific declaration to the contrary; while among UN organs prevailing opinion was of continuing applicability of HRL treaties to successor States¹⁸⁸. Thereby, due to special status of HRL and IHL treaties, state succession to these treaties seems only natural¹⁸⁹.

In practice concept was applied by former Yugoslav (SFRY) countries (considered being newly established States), which assumed themselves bound, by virtue of State succession, to the

¹⁸⁵ Art. 2 (1)(f) of the Vienna Convention on Succession of States in respect of Treaties, 1978, and Kamminga, p.470-471.

¹⁸⁶ A.Rasulov, Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity? p.149-150.

¹⁸⁷ Kamminga, p.472-473.

¹⁸⁸ Ibid, p.473-474.

¹⁸⁹ A.Rasulov, p.152.

treaties, to which SFRY had been a party (they succeeded to almost all HR and humanitarian treaties, binding former SFRY); Czech Republic and Slovakia did the same in relation to the treaties of the former Czechoslovakia; and lastly while none of the former USSR members succeeded to HR treaties (some acceded further on), nevertheless among them Kazakhstan, Kyrgyzstan, Tajikistan and Turkmenistan have succeeded to the GC's and Protocols¹⁹⁰.

As Kamminga concluded, State practice during 90th strongly supports the view, that obligations arising from a HR treaty are not affected by succession of States, their continuance occurs ipso facto; therefore successor States are under no obligation to issue confirmations to anyone. The same applies in relation to humanitarian treaties. Practice, followed by former USSR States, in accession, rather than succession to HR treaties, and by some States to humanitarian treaties, is not satisfactory, because it fails to recognize the special character of HR and humanitarian treaties; and as well creates gaps in accountability in respect of any violations, occurring in the period between the moment of independence and the entry into force of the treaty for the successor State¹⁹¹.

According to Rasulov, central evidentiary value (practice of treaty adherence) in ascertainment of customary law on state succession to humanitarian treaties is played by depositary records, where verbal acts, notes and declarations of the successor states are registered¹⁹². He concludes that practice of HR bodies, although some of them insisted that obligations under various humanitarian treaties continue automatically to bind successor states, viewed succession notes as constitutive acts, by that requiring manifesting and confirming their succession in a formal way, what means rejecting any theory of automatic succession as such (since two concepts of "automatic succession" and "notification of succession" are mutually exclusive)¹⁹³. In this way he finds support for the "clean slate" rule, even in relation to IHL and HRL treaties, and concludes that general custom on automatic succession (favored by Kamminga) in relation to treaties of humanitarian character was not established.

Nevertheless, some of the scholars claim de facto continuity of IHL and HRL treaties, though formalities (such as sending of succession notes) are practically performed in treaty succession, States view them as mere formalities, which means that from a legal perspective they

¹⁹⁰ Ibid, p.160-161.

¹⁹¹ Kamminga, p.482-484.

¹⁹² Rasulov, p.155.

¹⁹³ Ibid, p.157-158.

continue treaties in a quasi-automatic mode. This is mainly related to law-making treaties, of which humanitarian treaties are a subclass. According to this reasoning, automatic succession to humanitarian treaties can start as a matter of convenience, however at some stage, because every state chooses to continue its humanitarian treaties, some successor states will start to believe that they are under a legal duty to succeed; what would bring into existence Kamminga's model¹⁹⁴. Moreover, Rasulov pointed out that regional custom, favoring Kamminga's model, i.e. succession to humanitarian and HR treaties, was in formation in Eastern Europe.

Rasulov pointed out that the idea of automatic succession to humanitarian treaties, strengthened by the doctrine of "acquired rights", possess enough legitimacy to be incorporated into positive international law¹⁹⁵. This idea was also supported by Mullerson in relation to new states, emerging as a result of dissolution of a previous state, who stated that there is a very strong argument in favor of their (new states) succession to universal as well as regional multilateral HR and humanitarian instruments, since those treaties contain not only reciprocal commitments of states, but also rights and freedoms of individuals under their jurisdiction, which constitute in a sense "acquired rights" that states are not free to take away. The non-participation of successor states in IHL and HRL treaties, signed by their predecessors, would leave the populations of these countries without the protection they had formerly enjoyed¹⁹⁶. As he concludes, a change of circumstances, resulting from succession, usually does not affect universal treaties, which codify CIL; new states simply forced, by the very fact of becoming members of the international community of states, to adhere to such treaties, if not formally, as new states usually do, then at least to follow informally treaty rules in their relations with other states¹⁹⁷.

Human Rights Committee (HRC) in 1992 took a position, suggesting that, when a state party to the Covenant has disintegrated, new states forming on that same territory remain bound, within their respective territories, by obligations of the Covenant. The Committee expressed the view that successor states were automatically bound by obligations under HR instruments from

¹⁹⁴ Ibid, p.159.

¹⁹⁵ Ibid, p.142.

¹⁹⁶ R.Mullerson, *New Developments in the Former USSR and Yugoslavia*, p.319-320.

¹⁹⁷ Ibid, p.321.

the respective date of independence, and that observance of the obligations should not depend on a declaration of confirmation, made by the government of the successor state¹⁹⁸.

In practice concept of “automatic succession” was applied by ICTY jurisprudence, when Appeals Chamber (AC(h)) in *Celebici* case stated “irrespective of any findings as to formal succession, Bosnia and Herzegovina would in any event have succeeded to the {GC’s} under customary law, as this type of convention entails automatic succession, *i.e.*, without the need for any formal confirmation of adherence by the successor State. It may be now considered in international law that there is automatic state succession to multilateral humanitarian treaties in the broad sense, *i.e.*, treaties of universal character which express fundamental human rights...” where “it is indisputable that the {GC’s} fall within this category of universal multilateral treaties which reflect rules accepted and recognized by the international community as a whole... In light of the object and purpose of the {GC’s}, which is to guarantee the protection of certain fundamental values common to mankind in times of {AC}, and of the customary nature of their provisions, the Appeals Chamber is in no doubt that State succession has no impact on obligations arising out from these fundamental humanitarian conventions...”¹⁹⁹.

Judge Shahabuddeen in his separate opinion pointed out that humanitarian nature of a treaty (in the case it was Genocide Convention), together with its humanitarian objects and purposes, creates a judicial mechanism, in which successor states made party to a humanitarian treaty by virtue of the adherence of the predecessor state. Moreover the break in protection, which arises as a result of absence of automaticity in treaty succession, would be incompatible with the object and purpose of the humanitarian treaties, which safeguard fundamental rights and freedoms of an individual and endorse the most elementary principles of morality²⁰⁰.

Judge Weeramantry in his separate opinion in the same case emphasized that according to the contemporary principles of international law there is an automatic State succession to the IHL and HRL treaties (as those treaties should be exempted from clean slate principle), of which Genocide Convention is a part, and there is no doubt for the automatic succession to those treaties, as international community has a special interest in their continuity²⁰¹. Furthermore,

¹⁹⁸ R.Higgins, Human Rights in the ICJ, p.749.

¹⁹⁹ ICTY, AC(h) Judgment, *Celebici* case, para.111-113.

²⁰⁰ Separate opinion of Judge Shahabuddeen, Application of the Genocide Convention (Bosnia and Herzegovina v. Yugoslavia), ICJ Reports 1996, at 635-637.

²⁰¹ Ibid, Separate Opinion of Judge Weeramantry, at 642.

humanitarian treaties cannot be suspended during times of internal unrest, accompanying the break-up of a State, when they are needed most²⁰².

* * *

Through the reference to various scholarly opinions on the concept of automatic succession, it is author's opinion that the notion is progressively developed in international law (in theory, among different scholars, in practice as propounded by Courts and HRC) and possesses enough legitimacy (even considered contemporary principle of international law among some scholars) to be applicable in NK conflict. It is of particular necessity in the circumstances of the ongoing AC, since without automatic succession to GC's there would be a gap, caused by break up of old political regime of USSR and emergence of the new regime of the corresponding states, in the protection enjoyed by civilians and all other protected persons. This gap can lead to the environment, where most flagrant violations of the fundamental HR occur, leaving all violent acts unaddressed. Moreover, among some countries of the former USSR succession in relation to the GC's took place, therefore, in my opinion, it is reasonable to consider the same practice as the most pertinent for the countries at discussion, as part of the process of formation of a regional custom, since the similar process of formation of the regional custom on automatic succession occurred in Eastern Europe.

Moreover, provisions of the GC's, pertaining to the protection of civilians, are customary in nature (in author's opinion), given their inheritance from the customary principle of distinction between civilians and members of armed forces, and, therefore, should be safeguarded and applied, regardless of any formal confirmations. In this way, it is my opinion that there was not a gap in the protection enjoyed by civilians, since it is unclear on what ground protection, exercised formerly, can cease with the transformation of political regime, particularly in the circumstances of the origin of those protective rules from customary principle of international law.

5.2.2 Legal status of the protected persons in IAC's.

In IAC's protection of civilians is regulated by GC IV; therefore it is necessary to point out how it defines protected persons. Article 4 defines protected persons as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or

²⁰² Ibid, at 651.

occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”²⁰³.

ICRC distinguished two main types of the civilian population, to whom Article 4 renders its protection. The first category - persons of enemy nationality living in the territory of a belligerent State, i.e. persons of foreign nationality in relation to the belligerent states population nationality; second category- the inhabitants of the occupied territories, persons who are not of the same nationality as the occupying Power²⁰⁴.

5.2.3 The factual circumstances of the conflict and rules pertaining to the protection of the protected persons.

Application of the CA 3 is uncontested in relation to the hostilities taking place in 1987(88) -1992, as being internal in nature, and further on in relation to post 1991 hostilities (due to its customary nature). Nevertheless the cornerstone of discussion is the rules, pertaining to the protection of civilians, once the conflict changed its nature to international, thus rules which are contained in the GC IV. In order to apply provisions of the GC IV we need to observe how article 4 (defining protected persons) is comparable with the case of NK conflict.

The conflict in its international phase was signified by occupation process of NK region and territories neighboring with it by Armenian armed forces. This occupation resulted in the displacement of the ethnic Azeri population from those respective territories, as they fled upon attack by Armenian forces or on their approach to the cities and villages. Consequently, Armenian power was established in NK and neighboring territories occupied, with no ethnic Azeri civilian population presented in those areas, with the only civilians left - Azerbaijani citizens (or nationals) of Armenian ethnicity. In this situation article 4 of the GC IV, technically, is applicable to those ethnic Armenian civilians with Azeri citizenship (since formally they are inhabitants of the occupied territory of different “nationality” in respect of occupying power).

Nevertheless, as propounded by ICTY, it is necessary to delve further into the object and purpose of article 4, to provide the maximum possible extent of protection, where in the Tadic AC(h) stipulated that nationality is not regarded as crucial and applicability of the article 4 should not be bound with purely formal and legal relations “...ethnicity rather than nationality

²⁰³ GC IV, Art. 4.

²⁰⁴ ICRC, Commentary to the GC IV, p.45-46.

may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons....allegiance to a Party to the conflict ...may be regarded as the crucial test”²⁰⁵.The chamber concluded that though perpetrators and victims (being of different ethnicity) nominally possessed the same nationality (were citizens of Bosnia and Herzegovina), since victims did not owe allegiance to the State on behalf of which the perpetrators were acting, they enjoyed protection under article 4 of the GC IV²⁰⁶. In the case of discussion we can apply propounded formula in reversed way: though formally perpetrators (Armenian armed forces) and victims (ethnic Armenian civilians, possessing Azeri citizenship) were of different nationality, ethnic Armenian residents of NK are not to be considered protected under article 4, because despite their formal Azeri nationality, their ethnicity meant that they in fact did owe allegiance to Armenia. Hence application of the article 4 in relation to ethnic Armenian civilians is not relevant, whereas application of the article in relation to Azeri ethnic population requires consideration.

Upon occupation all ethnic Azeri civilians fled from the region and neighboring territories and found shelter in other parts of Azerbaijan. Referring back to the mentioned above categories of civilians, protected under article 4, we can see that they did not fall under second category of the protected persons, since they escaped the occupying regime, established later in the territories occupied; in regard of the first category, they were formally and ethnically Azeri nationals, therefore did not belong to the “enemy nationality” on the belligerent’s State territory (Azerbaijan was a belligerent State since armed hostilities were taking place there). Therefore ethnic Azeri civilians also did not fall under protection enjoyed under article 4 of the GC IV.

In light of these circumstances, I am inclined to conclude that upon escalation of the AC to international, article 4 was applicable neither to ethnic Armenian civilians in the occupied zone nor to the ethnic Azeri civilians.

²⁰⁵ ICTY, Tadic AC(h), para.166.

²⁰⁶ Ibid, para.169.

Conclusion.

The research question of this thesis was “whether the change in the status of the Nagorno-Karabakh armed conflict from non-international to international meant for the status of protected persons affected by that change?” In order to answer this question the thesis was divided into two parts with corresponding five chapters. The first part (first four chapters) discussed the nature of legal regulation of the NK AC. The discussion developed in the manner of comparison of international legal tenets of the AC’s existing today in the field of IHL in respect to NK conflict. Conclusions were made on the nature of the conflict for particular periods of its development, pointing out that at first it started as NIAC and possessed necessary elements in order to qualify as NIAC, required today in IHL, and later on, with collapse of USSR, the conflict qualified as IAC. Part two (the last chapter) provided discussion on whether the changed nature of the AC affected the status of protected persons. This analysis was presented in the discussion of the rules pertaining to the protection of civilians as during NIAC’s and IAC’s, existing today within customary and conventional IHL, what correspondingly triggered elaborations on the concept of civilians in both types of conflicts. One of the central themes of this chapter was discussion on whether conventional rules of IHL applied in the period of transition of the conflict, where reference was given to the concept of automatic succession to treaties. Author’s conclusions were that this concept was valid in respect of NK conflict.

In the process of this research the ultimate conclusion appeared that the change in the nature of NK conflict did not meant for any change in the status of the protected persons. Although it was provided that upon transition of the conflict from NIAC to IAC application of the GC’s was valid, in the further analysis it was revealed that protected persons in this conflict did not fall under category of protected persons of GC IV. In this way, civilians remained protected under CA 3, once triggered upon initiation of NIAC, and continued to enjoy protection under named article upon transitional changes in the region due to its humanitarian nature. By this civilians or persons not taking active part in the hostilities should have been protected by CA 3 from the attacks and threats of attacks, aiming at spreading terror, as inherited from the principle of distinction, as proscribed in paragraph (1)(a) of the article in its prohibition of violence to life and person..., and cruel treatment. Nevertheless this article was blatantly disregarded and constantly violated during both stages of conflict during - NIAC and IAC, causing casualties and massive flow of refugees particularly on Azeri side.

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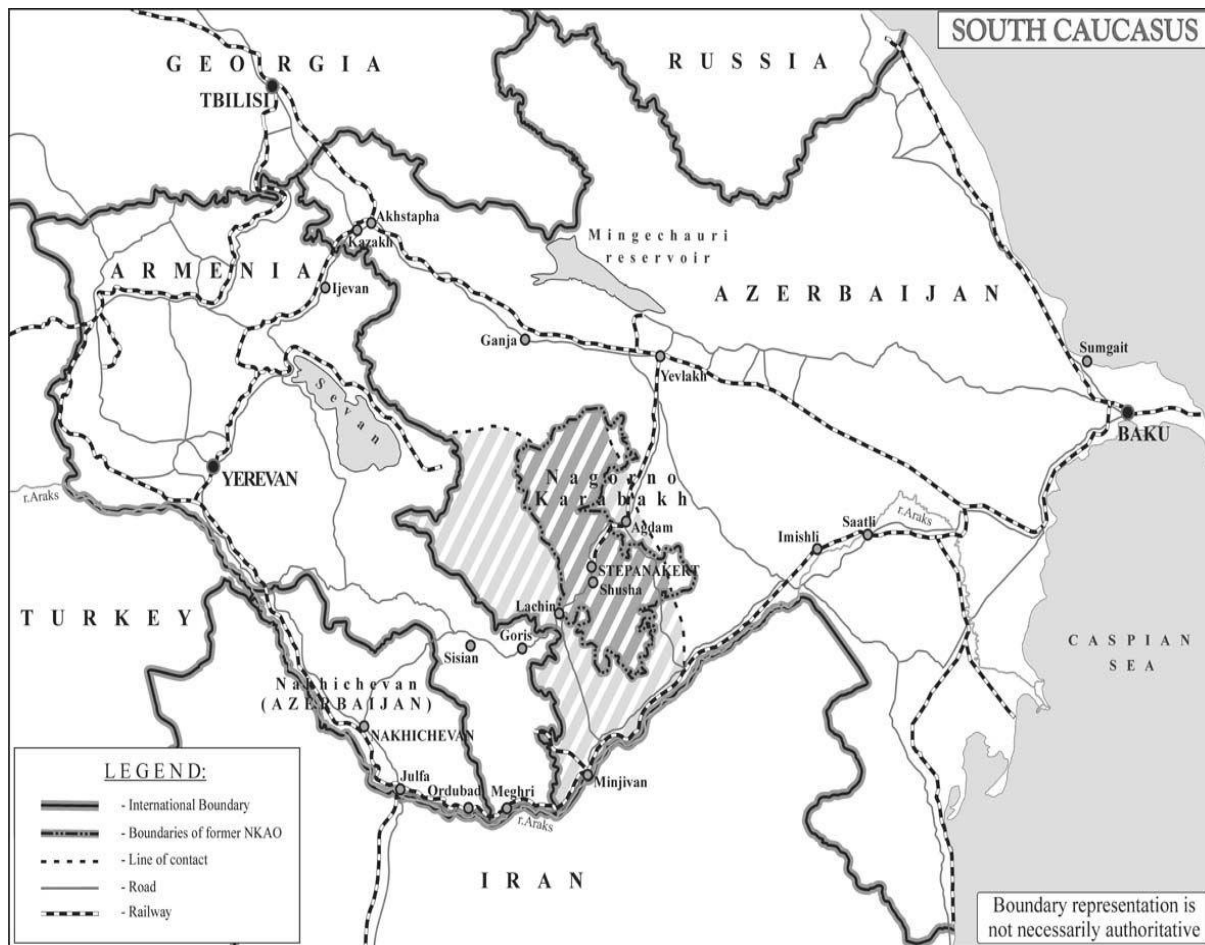
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Annex:
Map of South Caucasus.



MAP OF NAGORNO-KARABAKH AND SURROUNDING SEVEN DISTRICTS

